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No. 09-1422

IN THE

Supreme Court of the United States

PAUL S. MINOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's opposition to certiorari hardly reads as if it belongs in the same case as the petition. Despite petitioner's clear reliance on the First Amendment as the basis for his challenge to the district court's jury instructions, the government mentions the First Amendment only in passing. Opp. at 17-18. The government instead suggests that petitioner is advancing a *statutory* argument under the mail fraud statute in reliance on cases construing the Hobbs Act. Based on that straw man, the government argues that certiorari is inappropriate. When the Court considers the arguments petitioner actually advances, however, rather than the arguments the government manufactured, the opposite conclusion is clear: This case presents an important, recurring *constitutional* question on which the courts of appeals are deeply split and that warrants resolution by this Court.

The government also seeks to bury the constitutional question presented in this case by emphasizing its factual allegations at trial. But the factual allegations on which the government relies are precisely the type of allegations that pose a severe risk to the First Amendment rights of candidates and donors. No one disputes that petitioner guaranteed loans for Whitfield and Teel because he agreed with their judicial philosophies. To allow a *felony conviction* on that basis—without requiring any more from the jury than a finding of a "corrupt agreement"—"would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private

contributions or expenditures, as they have been from the beginning of the Nation." *McCormick v. United States*, 500 U.S. 257, 272 (1991). Because the First Amendment provides more than this superficial protection for core political expression, this Court should grant review.

I. The Government's Purported Procedural Impediments To Review Are Unavailing.

A. The government contends that this Court's review would be premature because this case was remanded for resentencing in light of the Fifth Circuit's reversal of petitioner's federal program bribery convictions. But this Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997). Instead, as the government itself recognizes, denying certiorari pending further lower court proceedings is appropriate only where necessary to "ensure[] that all of a defendant's claims will be consolidated and presented in a single petition" and to serve "the interests of judicial economy." Opp. at 11; *see, e.g.*, *VMI v. United States*, 508 U.S. 946 (1993) (denying review because district court had not yet established remedy for constitutional violation).

Those interests do not counsel against review where a criminal case is remanded solely for resentencing—and the government cites no case suggesting otherwise. This Court has previously granted review in precisely such circumstances, without signaling any concern about the interlocutory status of the case. *See, e.g.*, *Zedner v. United States*, 547 U.S. 489, 496 n.2 (2006) (noting that "[t]he Court of Ap-

peals ultimately remanded the case for resentencing" and that the sentencing "issue is not before us").

As in *Zedner*, this Court's review in the present case could alter the convictions for which petitioner may be sentenced or eliminate the need for resentencing altogether. Indeed, in *Zedner*, this Court ultimately ordered dismissal of the indictment, and resentencing was therefore unnecessary. 547 U.S. at 509. So too here; were this Court to reverse petitioner's convictions, resentencing would be unnecessary. Immediate review thus serves, rather than undermines, the "interests of judicial economy."

B. The government next recycles the same waiver argument it advanced in the court of appeals. *See* U.S. C.A. Br. at 58. The Fifth Circuit rejected the government's invocation of waiver. It instead extensively analyzed—and rejected on the merits—petitioner's argument that, "because the loan guarantees were made in the context of Whitfield and Teel's electoral campaigns, their constitutional right to free political speech is at stake in this case." Pet. App. 29a. The court of appeals concluded that, "[a]lthough the district court did not require the Government to prove that Minor and the judges had identified a particular case that would be influenced at the time that Minor guaranteed the loans, the overwhelming weight of authority from this court and our sister circuits supports the conclusion that the law does not require such a showing from the Government." *Id.* at 39a (footnote omitted). That erroneous holding is squarely presented for this Court's review.[1]

[1] As explained in the petition, the "overwhelming weight of authority" on which the court of appeals relied to reach this

Moreover, not only was petitioner's constitutional argument pressed and passed upon in the Fifth Circuit, it was also raised (and rejected) in the district court. The government is able to describe petitioner's reliance on *McCormick* in the district court as a "tepid suggestion" only by excerpting out of context a small portion of that argument. Opp. at 13 (quoting 3/27/07 Tr. 4705). But immediately before the statement quoted by the government, petitioner's counsel specifically argued that "[w]e have offered the court the *McCormick* case which realizes that if exchanging a campaign contribution or value with seeking generalized good will were criminal conduct, then most of the campaign contributions, certainly significant contributions otherwise lawful through which public officials are elected would be criminal conduct." 3/27/07 Tr. 4705. This statement unambiguously invokes *McCormick*'s constitutionally based restrictions on the criminalization of campaign support.

In fact, petitioner repeatedly brought *McCormick* to the attention of the district court, explaining that *McCormick* "dealt with what is criminally actionable when the quid was in the nature of a campaign contribution." 3/15/07 Tr. 4107-08; *see also id.* 3/27/07 Tr. 4705-06. The government faults petitioner for not "ask[ing] the district court to find that any of Minor's payments to Whitfield and Teel were 'campaign contributions.'" Opp. at 13. But the Fifth Circuit explicitly addressed—and rejected on the

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[Footnote continued from previous page]

conclusion arose outside the campaign support context and therefore did not implicate the First Amendment values at stake in this case. Pet. 20.

merits—petitioner's argument that he was entitled to a jury instruction embodying the specific *quid pro quo* requirement. Pet. App. 39a. As in *McCormick*, this is sufficient to preserve the issue for this Court's review. Indeed, the petitioner in *McCormick* did not even ask for "an instruction to the effect that proof of an explicit *quid pro quo* was necessary to convict an elected official under the Hobbs Act for extorting a campaign contribution" (500 U.S. at 271 n.9), much less ask the jury to determine whether payments received by him were campaign contributions. *Id.* at 274. This Court nevertheless reached the question because it was raised in the court of appeals, and addressed and rejected on the merits by that court. *Id.* at 271 n.9.

In any event, it is undisputed that, at a minimum, the $40,000 loan guarantee to Whitfield and the $25,000 loan guarantee to Teel were campaign-related financial support. Pet. App. 38a. *McCormick* and *Evans v. United States*, 504 U.S. 255 (1992), make clear that the First Amendment requires proof of a specific *quid pro quo* whenever campaign support is the basis for criminal prosecution—even if non-campaign payments are also at issue. *See infra* pg. 10-11.

II. This Case Squarely Implicates An Entrenched Circuit Split On An Important First Amendment Question.

After attempting to interpose invented procedural barriers to this Court's review, the government seeks to obscure the circuit split directly implicated in this case. Its efforts are unpersuasive.

A. The government contends that the Fifth Circuit's decision does not conflict with the decisions of other courts because many of the cases on which pe-

titioner relies involve the Hobbs Act, not honest services fraud. But petitioner's argument is premised on the *First Amendment*, not on the specific language of any particular federal statute. *See, e.g.*, Pet. 12 ("This Court should grant review to resolve the circuits' irreconcilable disagreement on this frequently recurring First Amendment question."). If the "breathing space" that "First Amendment freedoms need . . . to survive" (*Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010)) requires proof of a specific *quid pro quo* to convict a defendant under the Hobbs Act where campaign-related financial support is at issue, then the First Amendment requires a similar showing under the mail and wire fraud statutes. Indeed, the holding in *McCormick* was premised on generally applicable concerns about criminalizing "conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions," *not* on the statutory language or legislative history of the Hobbs Act. *McCormick*, 500 U.S. at 272; *see also Evans*, 504 U.S. at 287 (Thomas, J., dissenting).[2]

The government's only argument to the contrary is that the mail and wire fraud statutes require an "intent to defraud," which purportedly ensures that "ordinary campaign activity" will not be criminalized. Opp. at 15. But this argument is wholly circular. The jury instructions in this case defined a "scheme to defraud another of honest services through brib-

[2] In any event, this Court has recently reaffirmed in *Skilling v. United States*, 130 S. Ct. 2896 (2010), that the honest services fraud statute "draws content . . . from other federal statutes proscribing—and defining—similar crimes," such as the Hobbs Act. *Id.* at 2933-34.

ery" in terms of the intent to influence an elected official, which begs the question of what influence the defendant must intend to obtain in order to commit honest-services-based mail or wire fraud. If a *quid pro quo* need not be specific, as the government argues, then an intent to influence an official to generally take "some future favorable action" (*United States v. Siegelman*, 561 F.3d 1215, 1226 (11th Cir. 2009), *vacated*, 130 S. Ct. 3452 (2010)) would suffice for a conviction—despite the fact that such a scienter requirement would not provide any of the protections of the specific *quid pro quo* requirement for which it is purportedly a substitute.

Contrary to the government's suggestion (at 16), the Ninth Circuit's decision in *United States v. Inzunza*, 580 F.3d 894 (9th Cir. 2009), makes clear that *McCormick*'s *quid pro quo* requirement applies to honest services fraud. *Inzunza* held that, "[u]nder the Hobbs Act, political campaign contributions rise to the level of extortion if they . . . [involve] a *quid pro quo*." 580 F.3d at 899-900 (citing *McCormick*, 500 U.S. at 273). *In the very next sentence*, the Ninth Circuit stated that, "[s]imilarly, when the government seeks to prove honest services fraud in the form of bribery, it must prove a *quid pro quo*." *Id.* at 900.[3]

B. The government's attempt to cast this case as a poor vehicle for review by emphasizing that it arises in the context of judicial elections is equally unpersuasive.

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[3] Although *Inzunza* ultimately misinterprets *McCormick*'s *quid pro quo* standard (Opp. at 16), it nevertheless holds that the standard in fact applies outside the Hobbs Act context.

The First Amendment protects the political speech of participants in judicial elections, just as it protects participants in elections for legislative and executive branch offices. Accordingly, "'[i]f the State chooses to tap the energy and the legitimizing power of the democratic process'" in selecting its judges—as 39 States have done—"'it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'" *Republican Party v. White*, 536 U.S. 765, 788 (2002) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). One of those rights is the freedom to provide financial support for like-minded political candidates (*Citizens United*, 130 S. Ct. at 898)—and to do so against the backdrop of unambiguous, bright-line rules that clearly distinguish between constitutionally protected political speech and felony bribery. The district court's instruction that the jury could convict petitioner simply based on a finding of "a corrupt agreement" between petitioner and his co-defendants (Pet. App. 85a)—which did not require a finding of even the generalized *quid pro quo* necessary to prove bribery outside the campaign contribution setting—provided grossly insufficient protection for petitioner's fundamental First Amendment freedoms.

C. The government does not attempt to distinguish the decisions from the First, Seventh, and Eighth Circuits applying the specific *quid pro quo* requirement on any ground other than that they did not "involve[] judicial-bribery schemes." Opp. at 18. As explained above, that attempt to distinguish the First Amendment's application in judicial elections from its application in legislative and executive branch elections has already been conclusively rejected by this Court. *See White*, 536 U.S. at 788.

The government's inability to mount a meaningful response to this circuit split is not surprising. The First, Seventh, and Eighth Circuits have all clearly held that, to obtain a bribery-related conviction in the campaign support context, "payments must be made with the expectation that a specific official act will be taken." *United States v. Giles*, 246 F.3d 966, 973 (7th Cir. 2001); *see also United States v. D'Amico*, 496 F.3d 95, 101 (1st Cir. 2007) ("where the payment takes the form of a campaign contribution, the government must prove a 'specific *quid pro quo*' between the public official and the payor"), *vacated*, 552 U.S. 1173 (2008), *reinstated in relevant part*, 19 F. 143 (1st Cir. July 11, 2008); *United States v. Evans*, 30 F.3d 1015, 1018-19 (8th Cir. 1994). The Fifth Circuit's holding that a specific *quid pro quo* is not required is flatly inconsistent with each of these decisions.

The government reserves its only substantive response to the circuit split for the Eleventh Circuit's decision in *Siegelman*, which, according to the government, merely "assum[ed] a *quid pro quo* instruction was required." Opp. at 18 (emphasis omitted). But the Eleventh Circuit noted that the government had not presented any authority contrary to that "assumption" (561 F.3d at 1225 n.14), and, as the government conceded in its brief in opposition in *Siegelman*, it was precisely the "requirement that the official and payor agree to exchange a contribution for *specific* action" that eliminated the risk of liability based on "only a generalized expectation of future official action." Br. for the United States in Opp. at 22, Sorich v. United States, Nos. 09-167 & 09-181. The government cannot now contend that no court has reached the very conclusion that it *defended* just nine months ago.

III. The Government Cannot Prove That The Instructional Error Was Harmless Beyond A Reasonable Doubt.

Because petitioner properly preserved his objection to the district court's First Amendment error (*see supra* pg. 3-5), the government is wrong when it contends that *petitioner* must prove that the error affected the judgment. Where a constitutional error was properly preserved, it is the *government's* burden to show "beyond a reasonable doubt" that the error was harmless. *Fry v. Pliler*, 551 U.S. 112, 116 (2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The government's only attempt to meet that burden is by asserting that petitioner's $100,000 loan guarantee to Whitfield and his assistance in Teel's criminal defense were not connected to their electoral campaigns, and thus the First Amendment protections applicable to campaign support are irrelevant to those aspects of the case. That argument fails both on the law and the facts.

The government ignores that the Fifth Circuit decided this case based on the assumption "that a *quid pro quo* instruction was necessary because at least some of the financial transactions in question were campaign-related." Pet. App. 38a. This assumption is correct. In *Evans*, for example, only one of the two payments appeared on a campaign disclosure form and was paid to the campaign, while the other was made secretly to the candidate himself. The Court nevertheless applied the specific *quid pro quo* requirement to *all* of the payments. *Evans*, 504 U.S. at 268.

In any event, both the $100,000 loan guarantee to Whitfield and petitioner's assistance in connection

with the criminal investigation of Teel were entitled to heightened First Amendment protection. Petitioner's assistance to Teel was protected by the First Amendment's Petition Clause. *See Prof'l Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993). Moreover, petitioner secured the $100,000 loan guarantee for Whitfield in the days *before* Whitfield's election, even though the loan proceeds were not ultimately paid until after the election. *2/27/07* Tr. at 2251. That loan guarantee is thus analogous to the payments in *McCormick*, one of which was not made until months *after* the candidate's election. 500 U.S. at 260. Despite that timing, the Court held that the defendant was entitled to a *quid pro quo* instruction for all of the payments. *Id.* at 275.

Finally, even if the $100,000 loan guarantee were not campaign-related, the government is incorrect when it contends that the jury's racketeering findings indicate that the jury relied on that guarantee to find an honest services violation. Opp. at 20. The jury found the predicate act of "bribery" in connection with the $100,000 loan guarantee. D.E. 572 (Apr. 2, 2007) (verdict form). A finding that a payment constituted bribery under state law is *not* a finding that mail fraud, with its attendant "intent to defraud," occurred. The government's speculation regarding the basis for the jury's findings therefore cannot satisfy its burden of showing harmlessness beyond a reasonable doubt or obviate the need for this Court to resolve the unsettled and profoundly important First Amendment question presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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